No. 80-1706

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In the Supreme Court of the United States

OCTOBER TERM, 1980

DOUGLAS LACHANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government improperly cross-examined petitioner about the criminal records of three of his associates.

2. Whether petitioner's receipt of money from Russ Trucking Corporation was unlawful under 29 U.S.C. 186(b)(1).

3. Whether the evidence was sufficient to establish venue in the Southern District of New York with respect to certain counts on which petitioner was convicted.

4. Whether the district court, in imposing sentence, impermissibly considered petitioner's refusal to cooperate with the government in a criminal investigation.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Beaty v. *United States*, 213 F.2d 712	9
Dunn v. *United States*, 442 U.S. 100	9
Roberts v. *United States*, 445 U.S. 552	10
Spies v. *United States*, 317 U.S. 492	9
United States v. *Crawford*, 438 F.2d 441	5
United States v. *Grayson*, 438 U.S. 41	10
United States v. *Lippi*, 190 F. Supp. 604	8
United States v. *Lovasco*, 431 U.S. 783	10
United States v. *Ochoa*, 609 F.2d 198	5
United States v. *Overton*, 470 F.2d 761, cert. denied, 411 U.S. 900	6, 8
United States v. *Panebianco*, 543 F.2d 447, cert. denied, 429 U.S. 1103	8
United States v. *Roth*, 333 F.2d 450	6
United States v. *Ryan*, 225 F.2d 417, rev'd, 350 U.S. 299	6
United States v. *Ryan*, 350 U.S. 299	6
United States v. *Stofsky*, 409 F. Supp. 609, aff'd, 527 F.2d 237, cert. denied, 429 U.S. 819	9
United States v. *Vigo*, 435 F.2d 1347, cert. denied, 403 U.S. 908	5

PRECEDING PAGE WAS BLANK

Statutes and rule: Page

Hobbs Act, 18 U.S.C. 1951 2
Taft-Hartley Act, 29 U.S.C. *et seq.*:
29 U.S.C. 186(a) 6
29 U.S.C. 186(a)(2) 6
29 U.S.C. 186(b) 2
29 U.S.C. 186(b)(1) 5, 6, 7, 8
18 U.S.C. 2 2
18 U.S.C. 1962(c) 2
18 U.S.C. 3237 8
26 U.S.C. 7201 2
29 U.S.C. 432 7
Fed. R. Crim. P. 30 9

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A12) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1981. The petition for a writ of certiorari was filed on April 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on 58 counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and 18 U.S.C. 2; 62 counts of receiving unlawful labor payments, in violation of the Taft-Hartley Act, 29 U.S.C. 186(b), and 18 U.S.C. 2; one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); and three counts of tax evasion, in violation of 26 U.S.C. 7201. He was sentenced to a total of 12 years' and four months' imprisonment, broken down as follows: concurrent terms of 10 years' imprisonment on the RICO count, nine years' and eight months' imprisonment on the Hobbs Act counts (two months per count), and 10 years' and four months' imprisonment on the Taft-Hartley counts (two months per count); concurrent two-year terms of imprisonment on the three tax evasion counts, to be served consecutively to the sentences imposed on the other counts. In addition, he was fined a total of $100,000. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A12).[1]

The trial evidence showed that petitioner was a business agent of the Newspaper and Mail Deliverers Union ("NMDU") from May 5, 1969, to May 3, 1976; he then served as president of NMDU for four years. During the 11 years that petitioner was an official of NMDU, he coerced executives of delivery

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[1] The court reversed three of the Taft-Hartley counts (Counts 127-129) because the evidence was insufficient to support venue in the Southern District of New York. On remand, the district court resentenced petitioner to a total of 12 years' imprisonment and fines of $98,500.

companies employing NMDU members to make a variety of illegal cash payments that exceeded $250,000. During the 1978 New York City newspaper strike, for example, petitioner enriched himself in the amount of $90,000 by demanding from wholesale deliverers ½¢ on each "interim newspaper" they delivered (Tr. 707-711, 508-509, 708-709, 955-962, 1076-1079; Gov. Exh. 6A, 6B, 6C, 6E).[2] On other occasions, he obtained illegal payoffs for various purposes in exchange for agreeing to layoffs of NMDU members (Tr. 84, 86-90, 92-94, 168-169; 560-564, 575, 686-690, 693-694, 941-943); in connection with the negotiation and signing of a collective bargaining agreement (Tr. 734, 1072-1073); to ensure the uneventful expansion of business by certain wholesalers (Tr. 946-953, 1034, 1036, 1061-1063); and to ensure labor peace (*e.g.*, Tr. 166-167, 180-182, 246, 519).

In addition, petitioner was an undisclosed principal in Russ Trucking Corporation, a non-union trucking company that profited from paying its drivers wages that were lower than those that it would have had to pay if the drivers had been NMDU members. By installing his personal accountant as Russ's treasurer, petitioner was able to obtain more than $89,000 in illegal cash payments from the company (Tr. 305-306, 314, 319, 322-323, 357-358, 361, 387-389, 704). Petitioner failed to report any of these illegal cash payments on his personal income tax returns.

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[2] "Tr." refers to the trial transcript; "App." refers to the appendix in the court of appeals; and "S.Tr." refers to the transcript of sentencing.

ARGUMENT

1. Petitioner contends (Pet. 29-37) that the government improperly cross-examined him concerning his knowledge of the criminal records of three of his associates, Peter DiPalermo (App. 1521-1522), Charlie West (App. 1523), and Matthew Troy (App. 1625-1626).[3] That contention lacks merit.

When petitioner testified at trial, he portrayed himself as a dedicated and incorruptible union official. He asserted that he had never missed a union meeting (App. 1446-1469), and he emphasized his service as a trustee and chairman of the union's $14 million pension and welfare fund (App. 1564-1566). He described in detail how he had continuously and firmly rejected every attempt by unscrupulous executives of wholesale companies to buy his influence (*e.g.*, App. 1470-1472, 1588, 1632-1633). He also asserted that he had even avoided any private meetings with such wholesalers "to make sure there was no hint of impropriety * * *" (App. 1577). In the face of this testimony, the government was certainly entitled to show that petitioner had not always acted in the best interests of NMDU or avoided the appearance of impropriety in his associations. Thus, it was proper for the government to ask petitioner whether he knew of DiPalermo's and West's criminal records, in connection with other evidence that he and DiPalermo had discussed union matters, including the doing of favors for West and for DiPalermo's relatives. Likewise, there was no impropriety in the government's inquiry concerning petitioner's knowl-

[3] DiPalermo had been convicted of counterfeiting, tax evasion, and a narcotics violation; West had been convicted of extortion; and Troy had been convicted of tax evasion and grand larceny.

edge of Troy's convictions, when the evidence showed that petitioner had enlisted Troy's assistance in removing NMDU's pension and welfare funds from one institution to another.

Nor was petitioner prejudiced by the government's questioning.[4] The jury already knew that petitioner was associated with wholesale delivery company representatives Leon Braunstein and Walter O'Hearn, both of whom had been convicted of making illegal labor payments. In addition, seven other representatives of wholesale delivery companies testified that they had made illegal payments to petitioner. Viewing the disputed questions (which constituted only a small part of petitioner's cross-examination) in light of the entire record developed during the course of petitioner's two-week trial, the court of appeals correctly concluded (Pet. App. A4) that these questions "did not impermissibly contribute to the verdict."

2. Petitioner also contends (Pet. 16-22) that his receipt of payments from Russ Trucking was not unlawful under 29 U.S.C. 186(b)(1), both because

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[4] We note that the question concerning Troy went unanswered because petitioner's objection to it was sustained, and that the court instructed the jury in its general charge that only the answers of witnesses are evidence (Tr. 1766). Petitioner admitted knowledge only of DiPalermo's conviction for counterfeiting. Significantly, petitioner did not find it necessary to request a jury instruction cautioning that his association with convicted felons should not be held against him. Finally, petitioner's reliance on *United States* v. *Ochoa*, 609 F.2d 198 (5th Cir. 1980), *United States* v. *Crawford*, 438 F.2d 441 (8th Cir. 1971), and *United States* v. *Vigo*, 435 F.2d 1347 (5th Cir. 1970), cert. denied, 403 U.S. 908 (1971), is misplaced. In each of these cases, unlike here, there was no legitimate purpose to be served by cross-examining the defendant with respect to the criminal records of relatives and acquaintances.

he had an ownership interest in the company and because Russ did not employ NMDU members. The court of appeals properly rejected that contention.

The plain language of Section 186(b)(1) makes unlawful the receipt by a union representative of "*any* payment * * * of *any* money" (emphasis added) that would violate Section 186(a). Likewise, Section 186(a)(2) prohibits the payment by an employer of "*any* money * * * to any labor organization, or any officer or employee thereof, which represents, seeks to represent, *or would admit to membership* any of the employees of such employer * * *" (emphasis added). Nothing in the statute requires that employees be present members of the union, nor does the statute contain any exception for payments to union officials who possess an ownership interest in the employer. See *United States* v. *Ryan*, 350 U.S. 299, 305 (1956) (Section 186 "outlaws all payments, with stated exceptions [not here relevant], between employer and representative"); *United States* v. *Overton*, 470 F.2d 761, 766 (2d Cir. 1972), cert. denied, 411 U.S. 900 (1973). The language of the statute is consistent with the broad congressional objective of " 'prevent[ing] employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers.' " *United States* v. *Roth*, 333 F.2d 450, 453 (2d Cir. 1964), quoting *United States* v. *Ryan*, 225 F.2d 417, 426 (2d Cir. 1955) (L. Hand, J., dissenting), rev'd, 350 U.S. 299, 300 (1956).

The trial evidence showed that NMDU represents employees engaged in the handling and delivery of newspapers in a territory that includes Connecticut, where Russ was located, and that Russ drivers do this very type of work. Because Russ drivers would therefore be eligible for membership in NMDU, the

court of appeals correctly held that petitioner's acceptance of payments from the company constituted a conflict of interest in express violation of Section 186(b)(1). That holding does not conflict with any decision of this Court or of any other court of appeals and therefore warrants no further review.[5]

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[5] Petitioner attempts (Pet. 17-18) to draw some support from the fact that 29 U.S.C. 432 requires that a union representative report any interest that he holds in an employer whose employees his union presently represents or is "actively seeking to represent," together with the fact that NMDU was not actively seeking to represent Russ employees. The reporting requirements of Section 432 are simply irrelevant here, however, because Section 186(b)(1), under which petitioner was prosecuted, prohibits the receipt of payments by union officials, not only from employers whose employees the union presently represents or is "actively seeking to represent," but also from employers whose employees the union "would admit to membership * * *." Indeed, this difference in language underscores the very different purposes of the two sections. The purpose of Section 432 is to give notice to employees of certain facts that may give rise to a conflict of interest on the part of an official of a union that presently represents them or is "actively seeking to represent" them. The purpose of Section 186(b)(1), on the other hand, is not to give notice of possible conflicts, but to prohibit certain dealings between representatives of management and labor. Thus, although there may be no immediate need to give the notice required by Section 432 (because the employees may have no practical need for such information until such time as the union is "actively seeking to represent" them) with respect to every union that "would admit [the employees] to membership" (29 U.S.C. 186(b)(1)), it is clear that a union official who receives payments from a company whose employees the union "would admit to membership" has violated Section 186(b)(1). In these circumstances, the fact that a union official may have no reporting duty does not, because of the divergent aims of the two sec-

3. Petitioner contends (Pet. 38-40, 23-27) that the evidence was insufficient to establish venue in the Southern District of New York with respect to 20 of the Taft-Hartley counts[6] and the three tax evasion counts.

Under 18 U.S.C. 3237, a criminal offense may be prosecuted in any district "in which such offense was begun, continued, or completed." With respect to the Taft-Hartley counts involving Russ (Counts 130-133), the evidence showed that the illegal cash payments received by petitioner were obtained at his direction from a bank within the Southern District of New York. Although the illegal payments underlying the remaining Taft-Hartley counts challenged by petitioner were all made outside the Southern District, the evidence established that the payments were solicited within the Southern District by Leon Braunstein, petitioner's middleman. Accordingly, the government proved by a preponderance of the evidence (see *United States* v. *Panebianco*, 543 F.2d 447, 455 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977)) that all of the Taft-Hartley offenses were begun or continued within the Southern District.

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tions, support the conclusion that the official has not violated Section 186(b)(1).

Petitioner also relies (Pet. 19) on dictum in *United States* v. *Lippi*, 190 F. Supp. 604 (D. Del. 1961), to the effect that the receipt of a dividend by a union official, who is also a *bona fide* shareholder, does not violate Section 186(b)(1). As the Second Circuit stated in *United States* v. *Overton*, *supra*, 470 F.2d at 766, however, the reasoning in *Lippi* "ignore[s] the literal language of the statute * * *." At all events, the receipt of a dividend by a *bona fide* stockholder of a company is quite dissimilar from petitioner's receipt of secret cash payments here.

[6] Counts 27, 38-41, 79-81, 107, 114-116, 122, 127-129, 130-133.

Likewise, the evidence was not insufficient to establish venue in the Southern District of New York with respect to the tax evasion counts. While it is true that petitioner's tax returns were not prepared, signed, or filed within the Southern District, the evidence showed that the unreported income consisted of undocumented secret cash payoffs received within the Southern District. As the court of appeals held (Pet. App. A5), receipt of secret cash payoffs constitutes an affirmative act of evasion sufficient to establish venue in a tax evasion case. See *Spies* v. *United States*, 317 U.S. 492, 499 (1943); *Beaty* v. *United States*, 213 F.2d 712, 715 (4th Cir. 1954); *United States* v. *Stofsky*, 409 F. Supp. 609, 619 (S.D.N.Y. 1973), aff'd, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976).[7]

4. After trial, petitioner refused to cooperate in a criminal investigation on the ground that he would incriminate himself by doing so. He contends (Pet. 40-41) that the district court, in imposing sentence, impermissibly considered this refusal to cooperate.

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[7] Citing *Dunn* v. *United States*, 442 U.S. 100, 106 (1979), petitioner contends (Pet. 24-25) that the government impermissibly changed its theory of venue in the court of appeals. Petitioner argues that the government alleged in the district court that his mere demanding and receiving of large cash payments in the Southern District established the jurisdictional nexus, while it relied on "affirmative acts of evasion" in the court of appeals. But the demanding and receiving of secret payoffs in cash were precisely the "affirmative acts of evasion" upon which the court of appeals relied in upholding venue here (Pet. App. A5). Petitioner also objects to the district court's failure to charge the jury on the issue of venue on the tax evasion counts (Pet. 28 n.**), but he neither requested such an instruction nor objected to the court's failure to give such an instruction (see Tr. 1817-1823). See Fed R. Crim. P. 30.

Petitioner did not raise this issue in the court of appeals, however, and it is therefore not properly raised here. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). At all events, petitioner's contention is insubstantial. Even assuming that a defendant's refusal to cooperate may not be held against him if it is based on a valid and timely assertion of his Fifth Amendment rights (a question this Court did not need to reach in *Roberts* v. *United States*, 445 U.S. 552 (1980)), the sentencing record here contains no suggestion that the district court in fact considered petitioner's refusal to cooperate when imposing sentence. Indeed, the sentence was expressly based on the "serious nature" of the offenses (S. Tr. 18), the court's belief that petitioner had perjured himself on the witness stand (*ibid.*), the absence of "extenuating circumstances" (*id.* at 19), and the "overwhelming proof of [petitioner's] culpability" (*ibid.*). All of these factors could properly be taken into consideration in selecting an appropriate sentence. See, *e.g.*, *United States* v. *Grayson*, 438 U.S. 41 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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